

MONTANA
ASSOCIATION OF
COUNTIES

SENATE LOCAL GOVERNMENT

EXHIBIT NO. 5

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The Honorable Senator John Esp, Member
Senate Local Government Committee

RE: HB 235

March 26, 2007

Senator Esp,

You have asked me to research the usage of "may" versus "shall" in regards to proposed amendments to House Bill 235, regarding the establishment of a Business Improvement District.

In 1985, the Legislature passed House Bill 616, Chapter 656, the Act authorizing the creation of a Business Improvement District. The above question pertains to section 4 of the bill as enacted.

Section 4. Establishment of a district. (1) Upon receipt of a petition signed by the owners of more than 60% of the area of the property proposed in the petition to be included in a district, a governing body shall establish a district as provided in [this act].

Section 2-5 of the Montana Legislative Services Bill Drafting Manual (2006) clearly defines the usage of "may" and "shall" as follows:

Shall: Use "shall" when imposing a duty on a person or entity.

May: Use "may" to confer a discretionary right, privilege, or power.

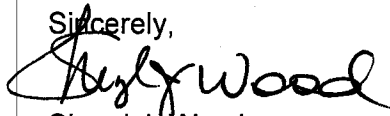
With the enactment of the original Act, the Legislature imposed the duty of the governing body to establish the district by their use of the word "shall".

Should the word "shall" be amended to "may", the governing body would have the discretionary right to decide whether or not to create the district. It is unclear as to the petitioner's recourse if the petition is denied.

The Senate Local Government Committee has the authority to determine the policy in this matter as to whether the local governing body has a duty to create a district upon receipt of a petition, or whether the local governing body has discretionary right.

The relevant documents are attached for your reference. I hope this sufficiently answers your question. Please feel free to contact me if I can provide further information.

Sincerely,



Sheryl J. Wood
Associate Director

Cc: Senate Local Government Committee

MACo

CHAPTER NO. 656

[HB 616]

AN ACT AUTHORIZING CREATION OF BUSINESS IMPROVEMENT DISTRICTS; PROVIDING PROCEDURES FOR CREATION; PROVIDING FOR ORGANIZATION, OPERATION, APPOINTMENT, TERMS, AND REMOVAL OF A BOARD OF TRUSTEES; ESTABLISHING POWERS OF THE BOARD OF TRUSTEES; PROVIDING FOR A BUDGET AND AN ANNUAL WORK PLAN; PROVIDING FOR A MANNER OF ASSESSING COSTS; PROVIDING FOR A TAX LEVY UPON THE DISTRICT; PROVIDING FOR THE DURATION OF THE DISTRICT; PROHIBITING DECREASE IN SERVICES; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

Be it enacted by the Legislature of the State of Montana:

Section 1. **Short title.** [This act] may be cited as the "Business Improvement District Act".

Section 2. **Purpose.** The purpose of [this act] is to provide for the creation of business improvement districts having the purposes and powers provided in [this act] that will serve a public use; will promote the health, safety, prosperity, security, and general welfare of the inhabitants thereof and of the people of this state; and will be of special benefit to the property within the boundaries of any district created pursuant to the provisions of [this act].

Section 3. **Definitions.** As used in [this act], the following definitions apply:

(1) "Appointing authority" means the mayor in the case of a municipality, the board of county commissioners in the case of a county, or the chief executive of a consolidated city-county government.

(2) "Board" means the board of trustees created in [section 5].

(3) "Business" means all types of business, including professions.

(4) "District" means a business improvement district created under [this act].

(5) "Governing body" means the legislative body of a local government.

(6) "Local government" means a municipality, a county, or a consolidated city-county government.

(7) "Owner" means a person in whom appears the legal title to real property by deed duly recorded in the county records or a person in possession of real property under claim of ownership for himself or as the personal representative, agent, or guardian of the owner.

Section 4. **Establishment of a district.** (1) Upon receipt of a petition signed by the owners of more than 60% of the area of the property proposed in the petition to be included in a district, a governing body shall establish a district as provided in [this act].

(2) The boundaries of a district must comply with applicable zoning regulations and the district may not include areas that are zoned primarily as residential areas.

Section 5. Resolution of intention to create business improvement district — notice. (1) Before creating a district, the governing body shall pass a resolution of intention to do so designating the boundaries thereof.

(2) Notice of passage of the resolution must be published for 5 days in a daily newspaper or in one issue of a weekly paper published in the municipality or county or, in case no newspaper is published in the municipality or county, then by posting for 5 days in three public places in the municipality or county. A copy of the notice shall be mailed to every owner of real property within the proposed district listed on the last completed assessment roll for state, county, and school district taxes, at the owner's last-known address, on the same day the notice is first published or posted.

(3) The notice must describe the general purpose of the district and designate the time when and the place where the governing body will hear and pass upon all protests that may be made against the creation of such district. The notice shall refer to the resolution on file with the governing body or clerk, if any, for the description of the boundaries.

Section 6. Protest against proposed district. (1) Any owner of property liable to be assessed may make written protest against the extent or creation of the district to be assessed, or both.

(2) The protest must be in writing and must be delivered to the governing body or its clerk, if any, not later than 5 p.m. of the last day within 15 days after the date of the first publication of the notice of the resolution of intention. The date and hour of receipt of the protest shall be endorsed thereon.

Section 7. Hearing on protest — sufficient protest to bar proceedings. (1) At a regular meeting of the governing body after the expiration of the time within which protest may be made, the governing body shall proceed to hear and pass upon all protests. Its decision shall be final and conclusive.

(2) The governing body may adjourn the hearing from time to time. A protestant shall have the right to withdraw a protest at any time before final action thereon by the council or commission.

(3) No further action shall be taken upon the proposed district for 1 year if a written protest against passage of the proposed ordinance is filed by:

(a) owners of property within the proposed district having a taxable valuation, when aggregated, representing not less than 50% of the total taxable valuation of property within the district;

(b) not less than 50% of the owners of property within the district; or

(c) owners of property within the proposed district having projected assessments, when aggregated, representing not less than 50% of the total projected assessments for property within the district.

Section 8. Resolution creating business improvement district. When no protests have been delivered to the governing body within 15 days after the date of the first publication of the notice of the passing of the resolution of intention, when a protest shall have been found by the governing body to be insufficient or has been overruled, or when a protest against the extent of the proposed district has been heard and denied, the governing body has jurisdiction to order the creation of the district and shall pass a resolution creating the district in accordance with the resolution of intention.

Section 9. Board of trustees — appointment — number. (1) When the governing body of a local government adopts an ordinance creating a business improvement district, the appointing authority, with the approval of the governing body, shall appoint not less than five or more than seven owners of property within the district to comprise the board of trustees of the district.

(2) The number of members of the board, once established, may be changed within these limits from time to time by subsequent resolutions of the governing body of the local government. A resolution to reduce board membership may not require resignation of any member prior to completion of his appointed term.

Section 10. Term of office. (1) Three of the members who are first appointed must be designated to serve for terms of 1, 2, and 3 years, respectively, from the date of their appointments, and two must be designated to serve for terms of 4 years from the date of their appointment. For a seven-member commission, there must be two additional appointments for terms of 2 years and 3 years, respectively.

(2) After initial appointment, members must be appointed for a term of office of 4 years, except that a vacancy occurring during a term must be filled for the unexpired term. A member shall hold office until his successor has been appointed and qualified.

Section 11. Removal of board member. A member of a board of trustees may be removed by the appointing authority with the consent of the governing body.

Section 12. Organization of board of trustees — no compensation. (1) The appointing authority shall designate which member of the board is to be the first chairman. When the office of chairman of the board becomes vacant thereafter, the board shall elect a chairman from among its members. The term of office as chairman of the board, unless otherwise prescribed by the governing body, must be for 1 calendar year or for that portion thereof remaining after each chairman is designated or elected.

(2) Members may receive no compensation.

Section 13. Powers of board in administering district. The board in administering a district has all powers necessary to carry out the functions of the district contained in the ordinance creating it, including the power to:

(1) sue and be sued, enter into contracts, and hire and terminate personnel needed for its purposes;

- (2) provide special police, maintenance, or cleaning personnel for the protection and enjoyment of the general public using the business district;
- (3) landscape and beautify public areas and to maintain those areas;
- (4) contract with the governing body to maintain, operate, or repair public parking facilities;
- (5) contract with the governing body to maintain streets, alleys, malls, bridges, ramps, tunnels, landscaping, and other public facilities as mutually agreed upon;
- (6) promote private investment and business expansion in the district;
- (7) provide for the management and administration of the affairs of the district;
- (8) promote business activity by advertising, decorating, marketing, and promoting and managing events and other actions designed for the general promotion of business activities in the district; and
- (9) perform such other functions as are necessary to carry out the purposes of [this act] and to further the objectives of the district.

Section 14. Annual budget and work plan — approval — procedure — tax. (1) At a time determined by the governing body, the board shall submit to the governing body for approval a work plan and budget for the ensuing fiscal year.

(2) Following public notice that a work plan and budget have been submitted and that the governing body will levy an assessment to defray the cost of the work plan and budget, the governing body shall hold a public hearing on objections to the work plan and budget. After the hearing, the governing body may modify the work plan and budget as it considers necessary and appropriate.

(3) After approval of the work plan and budget and to defray the cost thereof for the next fiscal year, the governing body shall by resolution levy an assessment upon all of the property in the district using as a basis one of the methods prescribed in [section 15].

(4) A copy of the resolution shall be delivered to the treasurer of the local government to be placed on the tax roll and collected in the same manner as other taxes.

Section 15. Assessment of costs — area, lot, and taxable valuation options. (1) At the same time the board submits the annual budget and work plan to the governing body as provided in [section 14], the board shall also recommend to the governing body a method of levying an assessment on the property within the district which will best ensure that the assessment on each lot or parcel is equitable in proportion to the benefits to be received.

(2) The governing body shall annually assess the entire cost of the district against the entire district using a method which best ensures that the assessment on each lot or parcel is equitable in proportion to the benefits to be received. In determining the method of assessment to be used, the

governing body shall consider the recommendations of the board. The governing board shall levy the assessment using one of the following methods:

- (a) each lot or parcel of land within such district may be assessed for that part of the whole cost which its area bears to the area of the entire district, exclusive of streets, avenues, alleys, and public places;
- (b) if the governing body determines that the benefits derived by each lot or parcel are substantially equivalent, the cost may be assessed equally to each lot or parcel located within the district without regard to the area of the lot or parcel;
- (c) each lot or parcel of land, including the improvements thereon, may be assessed for that part of the whole cost of the district which its taxable valuation bears to the total taxable valuation of the property of the district; or
- (d) by using any combination of the assessment options provided in subsections (a) through (c).

Section 16. Duration of district. The period of duration of a business improvement district is for the period specified in the resolution of the governing body creating the district but shall not be for a period longer than 10 years unless the duration of the district is extended in compliance with the provisions of [this act] for the creation of a district.

Section 17. Governing body not to decrease public services. The governing body may not decrease the level of public services in the district existing prior to the creation of the district unless the services at the same time are decreased throughout the jurisdictional area of the governing body, nor may it transfer the financial burden of providing those services to the district. The governing body may not discriminate in the provision of publicly funded services between areas included in such district and areas not so included.

Section 18. Liability insurance required. The governing body may not approve the annual budget or the work plan submitted to it by the board unless the annual budget and the work plan provide for liability insurance coverage insuring the district, the board, and the local government against legal liability for personal injury and property damage in an amount determined sufficient for that purpose by the governing body.

Section 19. Limitation on local government liability. An obligation or debt of any nature of a district is not an obligation or debt of the local government that established the district, and in no event is a debt or obligation of a district payable out of any funds or properties of the local government. The debts and obligations of a district are payable solely from the funds and properties of the district.

Section 20. Effective date. This act is effective on passage and approval.

Approved April 30, 1985.

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STYLE AND LANGUAGE

2-1. Introduction.

Bills should be written in a simple, clear, and direct style, using complete sentences and phrased for the common reader as well as for the political or legal expert.

A poorly drafted, ambiguous bill will waste the time of citizens affected, confuse those charged with its administration, lead to litigation, and likely fail to accomplish the purpose of the requester. Good drafting requires concise wording that is understandable by a person who has no special knowledge of the subject.

If wording in a bill has to be paraphrased to make it intelligible to a nonexpert, it needs revising. In Montana, the common-law tradition has manifested itself in the timeworn, nonessential phrases and rhetorical flourishes found in our older legislative enactments. The suggestions contained in this chapter are designed to help the drafter avoid the most common faults in style and language evident in some of our present law.

As authority for basic rules of writing, the Legislative Services Division uses the latest edition of the *United States Government Printing Office Style Manual* and *The Gregg Reference Manual, Ninth Edition*, by William A. Sabin. Compounding of words is done according to the *Style Manual* and according to agency guidelines.

Generally, the ordinary rules of grammar apply to legislative writing; however, in a few instances, a departure from common usage is followed.

2-2. Word Choice Generally.

The objective in legislative drafting is to make the final product as precise and understandable as possible. There are hundreds of expressions, legal and otherwise, that can be simplified. In general:

- (1) never use a long word if a short one will do;
- (2) if it is possible to omit a word and preserve the desired meaning, always omit it; and
- (3) never use a foreign phrase, a scientific word, or a jargon word if there is an everyday English equivalent.

Remember that the bill must be both precise and clear. While striving for unstilted, clear, natural expression, the drafter must avoid becoming conversational. In conversation, the speaker reserves the right to explain what is meant. The drafter is not granted such a right. The entire meaning of a bill could be determined by the choice of one key word, so words must be chosen carefully.

An example of the kind of word choice to avoid is the conversational verb construct. This verb form appears most regularly as the combination of an accepted verbal base ("speed") and an accepted preposition ("up").

The resulting formulation ("speed up") is a conversational term unacceptable in bill drafting.

2-3. Tense.

Use the present tense. The law speaks in the present, and each law is designed to give a rule for the continuing present. The present tense is a simple and natural form of expression. "The present tense includes the future as well as the present." (See section 1-2-105(1), MCA.)

preferred A defendant in a criminal action is presumed to be innocent until the contrary is proved. When there is reasonable doubt whether guilt is satisfactorily shown, the defendant is entitled to an acquittal. (Present tense)

avoid A defendant in a criminal action shall be presumed to be innocent until the contrary shall be proved. When there is reasonable doubt whether guilt shall be satisfactorily shown, the defendant shall be entitled to an acquittal. (Future tense)

2-4. Mood.

Use the indicative mood. The drafter should avoid using the false imperative. The word "shall" should not be used to state a legal result or fact.

preferred The term "commission" means the capitol restoration commission.

avoid The term "commission" shall mean the capitol restoration commission.

preferred A person who violates [sections 1 through 5] is guilty of a misdemeanor.

avoid A person who violates [sections 1 through 5] shall be guilty of a misdemeanor.

2-5. Shall, Must, and May.

Avoid using will, should, and ought.

Shall

Use "shall" when imposing a duty on a person or entity. (Active) (See exception in section 4-16.)

example The licensee (department, judge, court) shall give the debtor a copy of the signed contract.

Must

Use "must" when the subject is a thing rather than a person or entity.
(Passive)

preferred The information must be set forth in the application.

avoid The information shall be set forth in the application.

preferred The application must contain the applicant's name.

avoid The application shall contain the applicant's name.

Use "must" when the subject is a person or entity that is acted upon.
(Passive)

preferred The judge must receive the application by the deadline.

avoid The judge shall receive the application by the deadline.

Use "must" to express requirements about what a person or an entity must be or have rather than what a person or entity must do.

preferred A candidate must be designated by the board and must be 18 years of age.

avoid A candidate shall be designated by the board and shall be 18 years of age.

preferred The nominee must meet the requirements of 37-3-305.

avoid The nominee shall meet the requirements of 37-3-305.

preferred The applicant must have a master's degree.

avoid The applicant shall have a master's degree.

preferred The members of the committee must include four physical therapists.

- avoid* The members of the committee shall include four physical therapists.
- preferred* The sheriff must become a member of the panel.
- avoid* The sheriff shall become a member of the panel.
- preferred* The governing body must have the local option sales tax question placed on the ballot.
- avoid* The governing body shall have the local option sales tax question placed on the ballot.

May

Use "may" to confer a discretionary right, privilege, or power.

- example* The applicant may renew the application.

May not

Use "may not" to express a prohibition.

Use "may not" if the verb that it qualifies is in the active voice.

- preferred* The applicant may not submit more than one application.
- avoid* The applicant must not submit more than one application.
- preferred* The applicant may not be a convicted embezzler.
- avoid* The applicant shall not be a convicted embezzler.

Mandates and prohibitions

When qualifying a verb in the active voice, "shall" is used as mandatory and "may not" or "may only" as prohibitory.

- preferred* The applicant shall sign the application.
- avoid* The applicant must sign the application.
- preferred* The applicant may not submit more than one application.
- avoid* The applicant must not submit more than one application.
- avoid* The applicant shall not submit more than one application.

preferred The applicant may submit only one application.

Whenever possible, use "shall" only in an imperative or mandatory sense and "may" in a permissive sense. When a right, privilege, or power is conferred, "may" should be used.

Do not use "shall" to confer a right because that implies a duty to enjoy the right.

preferred The officer is entitled to an annual salary of \$40,000.

avoid The officer shall receive an annual salary of \$40,000.

preferred The annual salary is \$40,000.

avoid The annual salary shall be \$40,000.

2-6. Negatives.

"Nor" may be used alone as a conjunction or with "neither".

Do not use "nor" in the same clause with any other negative; use "or" instead.

correct There are no pens or pencils in the storeroom.

incorrect There are no pens nor pencils in the storeroom.

2-7. Voice.

Whenever possible, draft in the active voice instead of the passive.

preferred The board shall appoint a director. (Active)

avoid A director must be appointed by the board. (Passive)

The active voice gives the agent, the doer, its logical position before the verb.

2-8. Number.

Use the singular instead of the plural when possible. The singular includes the plural. (See section 1-2-105(3), MCA.)

preferred A defendant in a criminal action is presumed innocent until the contrary is proved. (Singular)

(2) Multiply the difference by the number of months in which no payment was made.

4-16. Penalty.

If a violation of an act is to result in a penalty, a separate section is devoted to setting forth the penalty. The wording of this section is patterned after that used in the Montana Criminal Code of 1973.

example

NEW SECTION. Section 8. Penalty. A person convicted of violating 1-1-101 shall be fined an amount not to exceed \$500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

The traditional language in the above example provides an exception to the "shall/must" rule stated in section 2-5.

4-17. Repealer.

It may be necessary to repeal one or more statutes that conflict with a new act. Each statute to be repealed must be identified and listed separately. If an entire chapter or part is to be repealed, list the sections separately but do not include reserved sections. Do not say "chapter 7 is repealed" because this implies that no future law may be codified in chapter 7.

A statement that "all acts or parts of acts in conflict herewith are repealed" is improper and ineffective.

Whenever a bill repealing a section is drafted, the same bill must amend any other section in the Code containing a reference to the section being repealed. (See the discussion of the online internal reference list in section 1-8.)

example

NEW SECTION. Section 9. Repealer. Sections 1-1-101, 1-1-102, 1-1-103, 1-1-104, and 3-4-102, MCA, are repealed.

A repealer section may also repeal session law, such as termination sections and not yet effective repealer sections, from previous sessions. For example, if substantive law was to terminate after a certain period of time, the law can be made permanent by repealing the termination section of the act.

example

NEW SECTION. Section 9. Repealer. Section 4, Chapter 568, Laws of 1999, is repealed.